



# PUBLIC NOTICE

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DA 21-1501

Released: December 2, 2021

## REVISED TOWER CONSTRUCTION GUIDANCE FOR PROTECTION OF THE NORTHERN LONG-EARED BAT UNDER THE ENDANGERED SPECIES ACT

On April 29, 2016, the Wireless Telecommunications Bureau (Bureau) of the Federal Communications Commission (Commission) issued guidance for proposed facilities in the northern long-eared bat's (*Myotis septentrionalis*) range.<sup>1</sup> With this *Public Notice*, the Bureau revises its 2016 guidance to direct applicants to current U.S. Fish and Wildlife Service (Service) electronic resources, and to require the electronic submission of documentation to the Commission in certain limited circumstances, consistent with recent Bureau guidance regarding another threatened species.<sup>2</sup>

*Background.* On April 2, 2015, the northern long-eared bat (NLEB) was listed as threatened under the Endangered Species Act (ESA) due to the continued spread of white-nose syndrome.<sup>3</sup> In January 2016, the Service released a final 4(d) rule<sup>4</sup> and programmatic biological opinion<sup>5</sup> requiring protective measures related to the NLEB. Among other things, the Opinion provided an optional framework to streamline NLEB section 7 consultation (Streamlined Framework), which offers applicants the option to use a streamlined section 7 consultation process pursuant to the ESA under certain circumstances.<sup>6</sup>

In 2016, the Bureau released a public notice setting forth guidance to applicants for using the Streamlined Framework for facilities that may affect the NLEB.<sup>7</sup> The Bureau indicated that if the

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<sup>1</sup> *Tower Construction Guidance for Protection of Northern Long-Eared Bat under the Endangered Species Act*, Public Notice, 31 FCC Rcd 3960 (WTB 2016) (*2016 Guidance Public Notice*). The U.S. Fish and Wildlife Service (Service) defines range as “the geographic area a species is known or believed to occupy.” Service, *Midwest Endangered Species: Glossary*, <https://www.fws.gov/midwest/endangered/glossary/index.html> (last visited Dec. 2, 2021).

<sup>2</sup> See *Wireless Facility Construction Guidance Within the American Burying Beetle's Range*, Public Notice, DA 21-1500 (WTB Dec. 2, 2021).

<sup>3</sup> Service, Endangered and Threatened Wildlife and Plants; Threatened Species Status for the Northern Long-Eared Bat With 4(d) Rule, 80 Fed. Reg. 17973 (Apr. 2, 2015); 50 CFR § 17.11(h).

<sup>4</sup> Service, Endangered and Threatened Wildlife and Plants; 4(d) Rule for the Northern Long-Eared Bat, 81 Fed. Reg. 1900 (Jan. 14, 2016); 50 CFR § 17.40(o). A 4(d) rule framework is a streamlined consultation with the Service to determine the extent of the potential effects of a project on listed species and/or their critical habitat and whether further consultation is required.

<sup>5</sup> Service, Programmatic Biological Opinion on Final 4(d) Rule for the Northern Long-Eared Bat and Activities Excepted from Take Prohibitions (2016), <http://www.fws.gov/Midwest/endangered/mammals/nlebp/BONleBFinal4d.pdf> (Opinion). Under section 4(d), the Secretary of the Interior can issue specific regulations to provide for the conservation of threatened species.

<sup>6</sup> Opinion at 4-6.

<sup>7</sup> *2016 Guidance Public Notice*, 31 FCC Rcd at 3960.

Streamlined Framework applied to a proposed facility, the tower owner was not required to submit additional documentation to the Commission.<sup>8</sup>

*Discussion.* With this *Public Notice*, we direct applicants using the Streamlined Framework to complete the automated determination key for the NLEB through the Service's Information for Planning and Consultation (IPaC) system<sup>9</sup> and follow the Service's process for federal actions.<sup>10</sup> The key asks a series of detailed questions related to the project to help applicants determine the probable impact the proposed project will have on the NLEB, recommend steps to minimize the impact of the project, and determine whether the project will result in incidental takes of the species, and, if so, whether those incidental takes are excepted under the applicable 4(d) rule.<sup>11</sup>

After completing the automated determination key, an applicant will receive a letter from the Service, which will either be a: (i) "consistency" letter informing the applicant that it has satisfied and concluded its responsibilities under ESA section 7(a)(2) with respect to the project and that any activities resulting in incidental take are excepted from take prohibitions; or (ii) "formal consultation" letter informing the applicant that project-specific ESA section 7 formal consultation is necessary.

If an applicant receives a consistency letter and the applicant is submitting a related Antenna Structure Registration (ASR) or Universal Licensing System (ULS) application, the applicant must attach the consistency letter to its Commission application. If the applicant is not otherwise required to submit an application to the Commission, it must retain a copy of the consistency letter in its records and be prepared to produce a copy to the Commission if and when the Commission requests it.

If an applicant receives a formal consultation letter, it must notify the Bureau and concurrently submit a Biological Assessment (BA) completed by a qualified biologist at the following email address: [towercomments@fcc.gov](mailto:towercomments@fcc.gov).<sup>12</sup> The Bureau will enter formal consultation with the Service upon receiving the BA. The Service will provide a Biological Opinion (BO) to the Bureau once the formal consultation process is completed. The Bureau will in turn provide the BO to the applicant. The applicant must incorporate the BO's recommendations and file an environmental assessment along with its application either in ASR or ULS. No additional reporting is required with respect to the NLEB if the proposed facility will not be constructed in the NLEB's range.

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<sup>8</sup> 2016 *Guidance Public Notice*, 31 FCC Red at 3961 ("If no action is required with respect to the NLEB, or if the [Streamlined] Framework applies, the FCC does not require additional reporting.").

<sup>9</sup> The Service's IPaC system is available at: <https://ecos.fws.gov/ipac/>. IPaC helps to determine if a project qualifies for a programmatic consultation. By answering questions about the proposed project, a non-federal user can determine if a project is covered by a programmatic consultation and generate a consistency letter. Service, *IPaC Information for Planning and Consultation*, <https://ecos.fws.gov/ipac/> (last visited Dec. 2, 2021).

<sup>10</sup> Service, *Instructions on how to access and use the online Northern Long-Eared Bat 4(d) rule determination key*, [https://www.fws.gov/midwest/endangered/mammals/nleeb/determination\\_key\\_instructions\\_nleeb.html](https://www.fws.gov/midwest/endangered/mammals/nleeb/determination_key_instructions_nleeb.html) (last visited Dec. 2, 2021).

<sup>11</sup> "Take" is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19). "Incidental taking" is a take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. 50 CFR § 17.3. We note that intentional takes remain prohibited.

<sup>12</sup> See 50 CFR § 402.08; see also *id.* at § 402.12(b)(1) ("The procedures of this section are required for Federal actions that are 'major construction activities'").

We note that the additional recommended measures referenced in the *2016 Guidance Public Notice* continue to apply.<sup>13</sup>

For further information, contact Deborah Spring, Biologist, Wireless Telecommunications Bureau, Competition and Infrastructure Policy Division, [Deborah.Spring@FCC.gov](mailto:Deborah.Spring@FCC.gov).

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<sup>13</sup> *2016 Guidance Public Notice*, 31 FCC Rcd at 3961.